

PANEL 5**IS P2P SHARING OF MP3 FILES AN OBJECTIONABLE FORM OF FREE-RIDING?¹**

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1. INTRODUCTION

As soon as my 15 year old daughter hears a song she likes, she tries to find out the name of the band or the singer, then goes online, and downloads the song to her MP3 player, either from *eMule* or from *Limewire*. When I tell her that this is illegal, she laughs and says that everyone in her class downloads music.² She is absolutely not disturbed by any feeling of injustice or unfairness, and neither are her friends.³ In this paper, I want to argue that, despite the illegal character of these practices, the moral intuitions of these children are, on a fundamental normative level, not so obviously wrong. More precisely, I want to argue that the kind of peer-to-peer (P2P) downloading of music files these kids are practicing is only exceptionally an objectionable kind of free-riding.

Copyright protection of digital artistic production is a quickly evolving area, not only in its legal aspects, but also concerning the technical possibilities of copying and protecting. Moreover, it is surprisingly unclear what the economic effects of the growing possibilities of piracy as well as of commercialization based on downloading or 'streaming', i.e. interactively choosing music tracks without storage on the computer of the consumer, will be in the long run.⁴ This paper neither aims at exploring these possibilities nor at predicting what will happen. It merely focuses on the moral legitimacy of the prevailing copyright rules.

More particularly, it examines whether or not people who share music files on the Internet are acting like *unfair free riders*. Two main arguments in favour of P2P sharing, that is arguments that show that P2P sharing is not always an unfair form of free-riding, are

¹ I am grateful to Axel Gosseries, Alain Marciano and Alain Strowel for their helpful comments.

² Illegal downloading seems to be particularly widespread in France nowadays. Piracy is estimated twice as popular as in other OCDE countries. See the recent estimations mentioned and discussed in the newspapers *Les Echos* (6 September 2007, p. 23) and *Le Monde* (24 November 2007, p. 24).

³ And neither are the teachers of these kids. Curtis Cook mentions a survey of teachers conducted in the State of Illinois which shows that this group of the population feels quite justified when infringing copyright law. Cf. Cook 2002: 124-5.

⁴ Einhorn (2004: 106) mentions the possibilities of streaming as substituted for actual downloading. Liebowitz (2003: 20) risks some predictions about the future of copyright infringement.

advanced, both, perhaps surprisingly, starting from – but not totally endorsing - the ideas defended by David Gauthier, one of the main contemporary defenders of Lockean property rights. The first one defends the idea that, although copyright is an institutional scheme which aims to cope with the ‘public good’ aspect of information goods like the shared files, free riding may not nevertheless be morally condemnable insofar as the scheme as such is unfair. The second one starts from David Gauthier’s version of the Lockean proviso: negative externalities imposed on others with whom there is no market interaction at all, does not deteriorate the terms of trade and should therefore not be compensated. Some piracy does not replace any market interaction, and falls therefore under this scheme. This point will be related to some aspects of the ‘fair use’ exception.

None of the arguments are completely conclusive, but they show nevertheless that piracy is not morally condemnable, in many cases, on the basis of the free-riding argument. The arguments point out that in general the current copyright protection system, even if one totally accepts the objective of stimulating creativity, is ill adapted at least in some respects. The quick development of digitalization and sharing techniques makes this just more obvious.

2. IS FREE-RIDING IMMORAL?

One moral objection to peer-to-peer downloading is that downloaders are *free riders*, and, therefore, behave unfairly. The validity of this objection depends crucially on how we defend free riding and on whether or not all cases of free riding, according to the definition we adopt, are unfair.

A good starting point for a discussion of the possible unfairness of free riding is David Gauthier’s contractarian theory of economic justice. According to Gauthier (1986), perfect market interaction is the paradigm of rational and moral interaction. If I sell goods that I have produced, I am the legitimate owner of what the transaction yields. Market exchanges, like selling my products, are both rational and impartial, and beyond the debate about distributive justice. Two important conditions have to be respected, though. First, production should be based on my labour and on resources that are also available to others at the current market price. In other words, exchanges would become morally questionable if I would take advantage of a monopolistic possession of a production factor, i.e. if I would benefit from what Gauthier calls a ‘factor rent’. Secondly, exchanges would also become morally questionable if I would impose part of the production cost on others, i.e. if production would

create negative externalities, or, also, at least according to Gauthier, if production would take advantage of positive externalities created by others' activities without paying for them.

The topic of free riding comes into focus when the second condition is not satisfied, that is in situations in which there are *externalities* at play, i.e. situations in which consumption or production decisions of agents affect other agents' utility. These external effects, whether they are positive or negative, give, according to Gauthier, rise to two types of immoral behaviour: either being a free rider or being a parasite. "A free rider obtains a benefit without paying all or part of its cost. A parasite in obtaining a benefit displaces all or part of the cost" (Gauthier, 1986, p. 96).

The aim of any set of moral rules and regulations is to eliminate free riders and parasites (*ibid.*, p. 113). The whole point of moral rules in the economy can therefore be related to the failures of the market. Faced with these failures, rational people try to find solutions which will be both impartial and rational. The discussion of Gauthier's particular solution is beyond the scope of this paper. What matters here is the moral rejection of free-riders and parasites. In general, Gauthier's moral objection is against what he calls 'taking advantage of' someone else. Justice is defined by Gauthier as "the disposition not to take advantage of one's fellows, not to seek free goods or to impose uncompensated costs, provided that one supposes others similarly disposed" (*ibid.*, p.113).

The concept of a parasite is quite clear: in a more common language, it comes down to imposing negative externalities on others, in other words, harming other people. Gauthier gives an example: "The factory owner who disposes of her gaseous wastes by polluting the atmosphere without compensating those who suffer the pollution she causes is a parasite, displacing part of the costs of her activities on to others" (*ibid.*, p. 96). Parasitism is obviously unfair.

Gauthier also gives an example of free riding: "The shipowners whose vessels take navigational advantage of a lighthouse although they have contributed neither to its erection nor to its maintenance are free-riders" (*ibid.*, p. 96). The shipowners 'obtain a benefit' from a positive externality. However, it is unclear whether 'obtaining a benefit' from a positive externality, without paying, *necessarily* means *unfairly* 'taking advantage of', as Gauthier's definition suggests. Just consider the example of someone who has nice flowers in front of his house. Of course, the owner of the flowers is probably the person who sees these most often, but other people passing by also enjoy the view of these flowers. And yet it seems completely absurd to claim that the owner of the flowers should be allowed to constrain the passing people to pay for the view of the flowers they did not ask for. Similarly and more

closely related to the issue at stake, my neighbour Vincent is a professional musician, and sometimes, when I am sitting in the garden, I enjoy listening to him playing the violin. Still, that is clearly not a sufficient reason for him to charge me money. And yet, I benefit from an action which I did not pay for.⁵

Therefore, free riding as taking advantage of positive externalities seems *prima facie* morally acceptable.⁶ The flipside of this point is that there is no reason to allow the producer of positive externalities to appropriate them.

3. FREE-RIDING AND PUBLIC GOODS

However, this is too quick. As Gauthier's lighthouse example suggests, free riding on externalities cannot always be condoned from a moral point of view. At first sight, the distinction between morally acceptable forms of free-riding and unfair forms of free-riding seems related to the fact of whether or not one is free-riding on a good which is in some sense *public*. Technically, public goods are characterized by *non excludability*: once they exist, no one can be excluded from benefiting from them. A further characteristic is *non rivalry*: the fact that I enjoy the good does not bother other people enjoying the same good at the same time.⁷

If a good is a public good in this technical sense, free riding may possibly lead to the non production of the good. (Parsons, 2005, p. 643). Public goods are characterized by positive externalities to the extent that they cannot be produced by the standard market economy because of the very fact that their positive externalities prevent their production: the return on investment is lower than the investment needed to produce them. For instance, it would never be worthwhile for an individual shipowner to bear the cost of the construction of

⁵ A similar example is given by Nozick: "You may not decide to give me something, for example a book, and then grab money from me to pay for it, even if I have nothing better to spend the money on" (Nozick 1974: 95). Nozick argues especially against being coerced to participate involuntarily in a cooperative scheme. We will leave the whole issue of whether or not fair payments have to be voluntary aside: since we are talking of voluntary downloading, unsolicited benefits fall beyond the scope of this paper.

⁶ One could argue that diminishing prices caused by a more severe competition similarly decreases profits, and increases the consumer surplus. One could even argue that increasing the consumer surplus comes down to increasing the positive externalities (Lemley 2005: 1046-7): The fact that I would be willing to pay a particular amount of money for a book and that it is available at a lower price thanks to market competition makes that I do not have to pay what I consider to be the full price. See also Gordon & Watt (2003), Introduction.

⁷ These are often mentioned characteristics of public goods. However, the literature on public goods mentions sometimes other, mostly somehow related characteristics, such as 'jointness in supply', i.e. once a good is available to one consumer, it is available to others at no supplementary cost, 'indivisibility', etc. Cf. Cullity (1995 : 3-4).

a lighthouse.⁸ To the extent that non rivalry and non excludability may be a matter of degree, goods may be to some extent ‘public’, and, as a consequence, ‘underproduced’.⁹

If goods are ‘public’ in this sense, citizens will not gain potential benefits unless they find an alternative to the ordinary combination of private entrepreneurship and a competitive market. Typically, many common collective goods like streetlights, lighthouses or security are technically public goods. If everyone would free ride on them, they would not be provided. But in such cases, and only to the extent that we collectively judge that these goods are *socially desirable*, and therefore *should* be produced, we can indeed opt for alternatives to the standard case, i.e. market production in which the appropriation of positive externalities is allowed.

A first possibility is that the government may provide the good. In this case the tax payers contribute, independently of whether or not they benefit from the produced good. If the decision to produce the good is taken democratically, we may assume that the total value of the good exceeds the total cost. Moreover, the government does not capture this surplus, unlike a monopolist.

A second solution is, in the case of tangible goods, to set up an institution such that the good is no longer a public good in the technical sense. One may for example grant a right to an investor to exploit privately the ‘public’ good. Concrete examples are private toll roads, but recently this strategy is also used for tunnels and airports. This presupposes of course that excludability is to some extent realisable (Lemley, 2005, p. 1050). Unlike an ordinary street which may be used by anybody, private toll roads have access control. In this case it is important to stress that we do not need private investors to capture completely the positive externalities created by their investment, but just *enough* for their investment to be profitable. This explains why governments grant temporary exploitation licences for which different companies may compete. The latter strategy comes down to grant the right to internalize (part of) the positive externalities.

Whatever the specific exceptional institutional arrangement which copes with the public-good characteristic is, it comes down to an institutional ‘scheme’ that “confers benefits by making requirements of beneficiaries” (Cullity, 1995, p. 14), either tax money or specific fares for the benefits. Free-riding on such a scheme, which is only viable when most

⁸ Remark that here again, just like in the previous examples, free riding does not harm anyone.

⁹ Non rivalry is sometimes a matter of degree: if I watch the Old Faithful geyser at Yellowstone Park, I am not bothered by the fact that someone else is looking too. However, if there are several thousands of tourists watching similarly, that may diminish the pleasure I derive from the amazing phenomenon. Excludability may be a matter of degree when preventing someone from enjoying a good may be excessively costly.

other people satisfy the requirements, seems, *prima facie*, unfair, as several authors have argued.¹⁰ Not only would widespread free-riding undermine the very institutional scheme, it is moreover unfair to accept the benefit from such an institutional arrangement by taking advantage of others' benefit-producing compliance.

However, this delineation between fair and unfair free-riding, i.e. taking a free ride is OK unless it is on an institutional scheme which copes with a public good problem, is again too hasty. Garrett Cullity has convincingly argued that free riding on cooperative schemes which are set up to resolve 'public good' problems is only unfair when three conditions are satisfied. If they are not, free riding may, arguably, be fair. The conditions that allow us to say that taking a free-ride on an institutional scheme is unfair are the following.

First, the practice of participation in the institutional schema represents a net benefice for the potential free-rider. No free rider can be blamed, if his regular participation in the scheme would have made him worse off than he would have been without the very existence of the scheme. For example, suppose that I am poor and that there is a collectively organized cleaning system which cleans the streets twice a day, bringing them to an exceptional standard of cleanness.¹¹ Even if the cost is fairly distributed among the citizens, and street cleaning is a non rival and non excludable public good, my participation in the scheme (since I am poor and I am not really concerned with exceptionally clean streets) makes me worse off than I would be in the absence of the scheme. In this case, it seems questionable to condemn free riding as unfair. However, if I have a net benefice from the scheme, free riding is unfair, that is if the two other conditions are satisfied as well.

The second condition is that the scheme, as a whole, makes practically everyone better off when *fairly generalized*. Imagine a scheme that is organized in a fair way, that is the requirements it imposes on everyone are fairly distributed, but the scheme is overall inefficient: in this case it is not obvious to qualify free riding as unfair. Cullity gives the example of a system in which everyone would be liable to pay all unsolicited benefits that are worth their cost. (*ibid.*, p. 14). This system would be fair in the sense of the first condition but so inefficient that it would impoverish most people.¹²

The third condition concerns the absence of general moral objection against the scheme. One could think of a scheme which is itself unfair or also of a fairly distributed scheme among gangsters which exploits other people. When these three conditions are met,

¹⁰ See, e.g. Arneson 1982.

¹¹ This example is taken from Cullity (1995: 17).

¹² Most and not all because, as Cullity points out, it is possible to conceive overall inefficient systems of which some individuals would benefit.

taking a free ride on an institutional scheme which copes with a public good problem is unfair.¹³

Reframing these condition to fit in better with the question at stake comes down to this: Insofar as copyright is an institutional device to cope with a public good problem, P2P sharing of music files would be unfair if (1) if he did not share his music files, the downloader would still benefit from the current copyright protection, i.e. his utility would decrease if the system did not exist at all, (2) almost everyone concerned benefits from the current copyright protection, (3), the copyright protection cannot be morally blamed in any aspect.

4. INTELLECTUAL GOODS AS PUBLIC GOODS

The ‘public good’ aspect of intellectual property is related to a particular technical characteristic of intellectual goods. The cost of creating goods such as movies, songs or books is often high, but the cost of reproducing them is usually very low. (Landes & Posner, 1989, p. 326). Strictly speaking, goods such as books songs and movies are excludable, and to some extent rival goods. However, firstly, the marginal cost to produce a supplementary copy is extremely low. Since digitalization, it is close to zero. Especially the ratio of fixed to marginal costs is incomparably higher than that for material goods. Secondly, like in all competitive markets, the price would be close to the marginal cost in the absence of an exclusive right to copy. Both elements together imply that, given this particular high fixed costs/marginal cost ratio, producers cannot cover their fixed cost investment. As a consequence, the good cannot be produced by the private market, since no one will invest with a negative expected return. L30). For example, if the price of a CD goes down to the marginal cost of the production of the disk itself, the producers will not be able the capture the costs of the making of the record.

Copyright, and intellectual property rights in general, are precisely a solution for this ‘public good’ problem. By limiting the right to copy, or the right to take advantage of a new idea, they create scarcity in order to boost returns on creative investments. (Lemley, 2005, p. 31). To be clear, the expected return should cover the production costs, but also the risks, which are understandably high in creation. (Landes & Posner, 1989, p. 327)

¹³ We leave aside here the issue of whether or not the unfairness of free riding behaviour is a sufficient reason to coerce free riders to comply with the requirements of the scheme.

On the other hand, this exception to the general rule of the market mechanism - in which it is not allowed to charge people for positive externalities - does in no way imply that the creators of intellectual goods should have full control over these goods. On the contrary, a major goal of intellectual property rights is to avoid people keeping their ideas and inventions secret by guaranteeing a sufficiently long term monopolistic exploitation. After this monopolistic term, the intellectual goods are 'free' and people are allowed to take advantage of uncompensated positive externalities. (Lemley, 2005, p. 1052). This system has a lot of similarity with the system of private toll ways: it grants the right to internalize positive externalities. As a consequence; copyright necessarily produces deadweight loss (Gordon and Watt, 2003, p. xvii).

However, the point of copyright protection is also *to promote* uncompensated positive externalities: "Copyright protection, [...] trades off the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place. Stringing the correct balance between access and incentives is the central problem in copyright law" (Landes & Posner, 1989, p. 326)

The exception to the general rule of free competition seems necessary in order to stimulate creativity, but on the other hand, it seems also important to minimize the market distortion and not to overprotect intellectual goods. From this perspective, it is important, as Mark Lemley stresses, to take into consideration that intellectual property rights are in the first place "a form of legal protection to deal with public goods problems" (Lemley, 2005, p. 1030-1). Therefore, they should be compared with other forms of government intervention (subsidies, taxes etc) in the economy rather than with 'real' property. Whether or not free riding on this institutional scheme of legal protection is unfair depends on whether the three conditions mentioned in the preceding section are satisfied.

5. IS P2P SHARING OF MP3 FILES UNFAIRLY FREE RIDING ON 'PUBLIC GOODS'?

Since the copyright system can be considered as an institutional scheme to overcome a public good problem, we have to check, in order to qualify illegal downloading as unfair, whether the conditions Cullity has spelled out are met. In this section we will mainly focus on the second and third condition, leaving the first to section 6

The second condition states that the system should make (almost) everybody better off than either an alternative system or no system at all. The current system of copyright

protection is highly questionable in this respect. First, creativity seems to be overcompensated, and secondly, not unrelated to this phenomenon of overcompensation, since the market of popular music is structured as a winner takes all market, creators are compensated very unequally.

One can quite confidently argue that the situations of famous rock stars are factor rent situations. Admittedly, precisely defining rent is a tricky matter. David Gauthier defines factor rent, i.e. rent related to the monopolistic possession of a rare production factor, such as a special talent, as “a premium certain factors services command, over and above the full cost of supply, because there is no alternative to meet the demand” (Gauthier, 1986, p. 272) He specifies that this means, for the owner of rare talent, “to extract payment for his services over and above the cost to him, including the opportunity cost, of supplying those services” (*ibid.*). Although this definition may be to some extent imprecise, it is not difficult to suppose that, say, David Bowie would have composed his songs for less than he currently earns on the basis of copyright. The standard of living of famous rock star is widely described and photographed in popular magazines. Insofar as children are illegally downloading music of this kind of contemporary nobility, they may justify it with a Robin Hood argument: these people are so rich that a small decrease in their copyright revenue is rather recommendable.

The excessive incomes of famous rock stars are explained by the particular structure of the music business. The market of creation is of the ‘winner-take-all’ type. In winner-take-all markets, reward depends heavily on relative and not on absolute performance. When a farmer is slightly less productive than his neighbour, he will have a slightly smaller income. In the world of music, there is no such proportionality. The system of excessive reward creates “a few big winners and lots of losers who have wasted their time”. As Mark Lemley and others¹⁴ point out: “Virtually no musicians actually make money. Potential creators are drawn by the lure of the big score like moths to a flame, and most of the effort turns out to be wasted.” (Lemley, 2005, p. 1103). Robert Frank and Philip Cook give the following example: “At the turn of the century, Iowa alone had more than 1,500 of them [opera houses]. Thousands of sopranos earned adequate, if modest, livings from their live performances. But now, thanks to modern recordings, the world’s best soprano can be literally everywhere at once” (Frank and Cook, 1995).

The system of copyright protection combined with the typical winner-take-all market structure explains that the great majority of the musicians earn relatively little from

¹⁴ For example Regner 2003 and Smiers 2002.

copyrights. Most of the income generated by copyright work goes to the publishers and to a small minority of high earning performers (Regner, 2003, p. 109).¹⁵ **The second condition is clearly not met.**

Moreover, neither the third condition – i.e. the overall fairness of the system – is satisfied because winner-take-all markets are deeply unfair. Anyone who sometimes spends time in a place where live music is performed knows that there are many excellent musicians around. Even during ‘open mike’ session, one often cannot help to ask the question: Why are these people not famous whereas others, barely better or sometimes worse, live like kings? Of course, sometimes the ‘system’ picks up a street musician (Damien Rice is an example), but the artistic labour market is deeply divided between a few stars on the one hand and an army of losers on the other hand. Moreover, the high incentives for winners attract too many people to the market of creation, and this all the more the stronger the copyright protection is.¹⁶

On top of the unfairness of this system, it has also some other troubling side effects which are worth to be spelled out. First, the winner-take-all phenomenon is partly reinforced and explained by the rent seeking behaviour of the publishers, who are the actual owners of the copyright.¹⁷ The music industry is highly concentrated and the ‘majors’ which own also the channels by which the ‘content’ is distributed, want their artistic material (of which they own the copyright) distributed and bought. Marketing is aggressive, as Joost Smiers puts it “to the degree that alternate cultural options will be pushed away from many people’s mental map” (Smiers, 2002, p. 121). Following the commercial logic, money for marketing and promotion create ‘stars’.

One obvious effect of this marketing system that aims at exploiting copyright property is the star system. The mechanism and its catastrophic artistic consequences were already analysed in the 1940s by Max Horkheimer and Theodor W. Adorno. These authors showed how the mutual influence of the mass media, together with the development of a mass culture would narrow the artistic creation to standardized perfectly interchangeable consumption

¹⁵ For a theoretical discussion of the particular winner-takes-all market of popular entertainment see Rosen (1981) *The economics of Superstars* and Adler (1985). A more intuitive approach is to be found in Robert Frank, Philip J. Cook. ‘It’s a winner-take-all market - top money goes to top performing people or products.’ *Washington Monthly*, Dec 1995.

¹⁶ Frank and Cook explain this by the fact that many people overestimate their chances of « winning ». For one, people see much more often the winners than the losers, and for another, people are notoriously inadequate in estimating their own talents against those of others.

¹⁷ They pay so-called ‘royalties’ to the real creators. 3% except for big stars 15% ref. “Artists receive a certain percentage of the revenue their songs generate. The initial rate is mostly between 7 and 15 %, but different reductions lead to a final royalty percentage of about 3 %. See Regner (2003: 109).

products: songs of 3 minutes, TV soaps of 26 minutes, etc., based on stardom.¹⁸ Their prediction turned out to be basically correct. The overall effect of this commercial ‘culture industry is levelling down the intrinsic quality of cultural productions. Much of the music school kids are downloading is artistically more or less worthless. It is highly probable that a significant minority or even a majority of the population judges the music my daughter likes as ugly noise. The point is that the current copyright protection rules make investment in this kind of aggressively promoted records profitable, and school children kids are the most obvious consumers of these products. Therefore, it cannot be argued that the production of these goods demands an institutional device to overcome the ‘public good’ problem because they are rather the unlucky side-effects of the current overprotection of copyright.

Secondly, the flipside of this mass culture marketing system is that, paradoxically, current copyright protection may also be insufficient as an incentive for artistic production. For example, copyright protection alone would never make it possible to make a recording of the wonderful traditional Baka Pygmy music. I guess that many people would be willing to pay a couple of cents to contribute to the recording of world heritage music such as the Baka music, but rather unwilling to pay the equivalent of the price of a CD. In this case, the typical ‘public good’ problem cannot be resolved by the current copyright protection. Although it overcompensates creators, it is, at least in some cases, insufficient. Luckily, public institutions like UNESCO fill this gap.¹⁹

To conclude, it is obvious that, with respect to the musicians in general, the current system is not really an example of distributive justice. Therefore, and *only* insofar as people mostly download winners’ music, P2P sharing cannot be qualified as unfair, at least not unfair to these musicians. Some have even argued that one of the nice side-effects of the current crisis of the commercial music sector, due to digitalization and to illegal downloading, might be that it leads to a less concentrated music offer and to a situation in which more people are able to make a living, be it a less fanciful one than the one of the famous rock stars, out of music.²⁰ In this sense, illegal downloading contributes to more fairness.

Despite the fact that Cullity’s second and third condition are clearly not met – the current system does not make (almost) everyone better off and the distribution of its

¹⁸ Horkheimer & Adorno (1944: 109): „In der Tat ist es der Zirkel von Manipulation und rückwirkenden Bedürfnis, indem die Einheit des Systems immer dichter zusammenschießt.“ See also their analysis of the star system on p. 120 ff.

¹⁹ Cameroon Baka Pygmy Music. Unesco collection Auvidis. Musics & Musicians of the World. D8029.. ©Auvidis/IICMSD/Unesco 1990.

²⁰ See Joost Smiers (2002: 133) for some more detail.

advantages is, at least among creators, quite unfair –, from which it follows, according to Cullity, that free-riding on this system is not morally condemnable, there is one sense in which P2P sharing may still be nevertheless judged as unfair. This unfairness is about the radical market segmentation between payers and free riders. Movie and music files that are downloaded with P2P sharing systems are made on the basis of real existing CDs and DVDs. The fact that the CDs are still produced and sold, be it to a lesser extent, proves that they still can be produced by the market. The fact that profits diminish and that, therefore, the ‘consumer surplus’ increases is a normal phenomenon of the market economy. The question of whether P2P downloading makes their production impossible is pointless with respect to these files.

Piracy is only conceivable on the basis of produced work, and it therefore presupposes that the investment is valuable. Still, it is obvious that P2P sharing can only exist to the extent that part of the clients pay for their CDs. It presupposes therefore that in the market segment of the CDs, copyright is not infringed. The only morally problematic point here concerns the division of the consumer surplus, i.e. the decrease of the deadweight loss due to the P2P sharing: part of the consumers pay the former price (full deadweight included) and part of them pay nothing. This radical form of market segmentation is clearly unfair. However, it is unfair with respect to the paying consumers who finance the production but not necessarily unfair to the creators.

6. HARMLESS COPYING IN THE ABSENCE OF MARKET INTERACTION

Let me turn now to a second argument which shows that illegal downloading or copying is not necessarily a form of morally reprehensible free riding, even if the market of music would not be of the winner-take-all type, and if copyright would be pitched at a perfectly adequate level. It may be argued that some groups of downloaders do not have the purchasing power to buy some of the stuff they download. We may think of school kids, but also of people living in poor regions of the planet. The point we defend here is, basically, that since these very poor free riders would never be able to buy CDs in a regular way, they cannot be considered as unfair free riders. Four arguments may be brought in to support this view.

A first argument starts again from Gauthier's theory of justice. Besides the basic conditions we mentioned in section 2, Gauthier advances one further background condition to guarantee the impartiality of market exchanges. The condition is that interacting parties

should not deteriorate each others initial position before they start their market relations. It is his very much weakened version of the well-known Lockean proviso, which says that one may turn natural resources into private property as long as one leaves sufficiently of these to the others.

Gauthier gives the following example: “Suppose that we live as fisherfolk along the banks of a river. [...] But if you, living upstream from me, merely use the river for the disposal of your wastes, then even though you thereby kill many of the fish in my part of the stream, you do not violate the proviso. For although you worsen my situation in relation to what I should expect in your absence, you do not better your own situation through interaction with me.”(Gauthier 1986, p. 211-2). However, things change as soon as we start trading. The terms of trade are influenced by the supply of the fish which is influenced by your polluting: “You benefit from polluting my water; you better your situation through interaction that worsens mine” (*ibid.*). Gauthier argues that this harm should be compensated for in order to create fair market conditions.

The situation that interests us here is the first one, the one in which there is no commercial interaction. In that case, externalities, be they positive or negative, do not influence the terms of trade because there is no trade.²¹ Imagine the not so implausible case that dumping your wastes in the stream gives more food to the fish in the river so that I benefit from positive externalities. In this case, the question of compensation in the absence of market interaction would be totally pointless. Moreover, it is not obvious at all that these positive externalities should be compensated for: insofar as the people downstream did not ask for them, claiming compensation would be illegitimate.

The relevance of this proviso for our topic is that, in the absence of regular market interaction, benefiting from externalities cannot make interactions unfair and is therefore not morally condemnable. This point becomes interesting if one takes into consideration that the reason why it may be impossible to establish a market interaction is not necessary, like in Gauthier’s hypothetical example, unawareness of each other’s existence, but, more commonly, poverty. Since poor ‘pirates’ would simply never have bought the CD anyway, they do not deteriorate the market exchanges of the musicians (Gordon and Watt, 2003, p. 11).

²¹ Remark that David Gauthier’s example only mentions negative externalities. This is not clear from the quote, but obvious in the passage from which it is taken. Gauthier says that my desire to buy your fish is increased by your pollution.

A second argument relies on Cullity's first condition to qualify free riding as unfair we mentioned in section 3. Free riding cannot be qualified as unfair if normal participation to the institutional scheme that is set up to overcome a 'public good' problem, - here the non rivalry of music files, does not bring about a net benefice to the participant compared to the absence of the scheme. The current copyright system does not improve the situation of very poor people, insofar as they lack the purchasing power to buy CD's. Therefore, their free riding cannot be qualified as unfair.

The latter argument is echoed to some extent in the 'fair use' jurisprudence. This jurisprudence indicates some exceptional situations in which copying does not in any respect harm the copyright owner and can therefore not be considered as legally condemnable. Note: It should be noticed that, as we have stressed in section 2, that free riding never causes harm directly, it causes harm to the extent that it undermines the institutional scheme that was set up to resolve a 'public good' problem. The basic argument here is the no harm principle.

Fair use is quite a vague term that is used as a doctrine that allows different kinds of exceptions to the copyright law. Some copying of a copyrighted work does not make the copier an infringer. Section 107 of the U.S. Copyright Act mentions four major factors, drawn from prior judicial decisions, to be considered in judgments under the fair use doctrine.²² The first factor is the purpose and the character of the use. It indeed makes a difference, e.g., if the copier is a firm selling copies or not (Landes & Posner, 1989, p. 357).²³ Similarly, it seems obvious that we should be allowed to make a copy for personal use or share copies within families. I come back on this point below. A second factor which justifies the fair use exception is the nature of the copyrighted work: it is considered less harmful to copy factual information rather than creative information, and already published material rather than unpublished. Thirdly, the amount that is copied also matters. For example, less than a chapter of a book is acceptable. The last factor is the one which interests us particularly here: the degree to which the effect of copying on the potential market for the copyrighted work is negligible. If the copier is not a potential purchaser of copies, his use does not affect the demand for them, nor the supply (*ibid.*). This is in general the factor which is most often invoked to justify the fair use exception (Beebe, 2007). One reason why the copier will not have an effect on the market may be poverty. Poverty may explain why the

²² Similar laws apply in other legislations. For exemple the French Code de la propriété intellectuelle, Art L122-5 mentions similar exceptions.

²³ Recall the example of me listening to my neighbour Vincent playing the violin. I do not make records of his playing to sell them without paying him. In the latter case, I would make a profit by making Vincent unknowingly cover part of the production cost. Therefore, there is an important difference between simply enjoying a positive externality on the one hand, and using this externality to make a further profit.

copier would never buy copies. And, indeed, some of the explicitly mentioned exceptions in the jurisprudence of copyright concern the category of poor consumers.²⁴ Moreover, there are exceptions to the application of copyright related to the poverty of creators. For example, the US copyright Act (2000) “includes a provision that permits live performance of musical works and nondramatic literary works so long as the performance does not have a commercial purpose, the performers are not paid, and no admission fee is charged” (Shaffer Van Houweling, 2005, p. 1535).

A last, more fundamental reason and why a comparison between copying without paying copyright and stealing tangible goods –and therefore free riding may sometimes not be unfair - does not hold is that cultural goods have an intrinsic value, which has to be clearly distinguished from their market value. Creators want to make a living from their work, but they also want their work to be read, listened to or performed. Following this logic, creative artists want to be recognized in the first place. If a literary critic discusses a novel, the author will not bother to know whether the critic bought the book in a shop or picked it up in a public library. Especially with respect to real fans that do not have the means to buy an expensive copy, artistic creators somehow lose their artistic soul when they blame illegal downloading.

This last argument needs some further comment related to the fair use exception. The ambition to be recognized and famous has implications for the use of copies. If you want to be renowned you have to accept that people talk about your work, share their opinions and borrow occasionally things from each other. This kind of sharing does not require any copying, but may nevertheless affect the market. Take the following example. A friend of mine is a member of a reading group. The group of about 12 members meets every year to discuss the new novels that seem worth reading. They agree on a list, each buy of the books, read it and transmit it to another member the next month. At the end of the year, they have read 12 books but paid for only one. Although their main motivation is not to save money, it is rather a quite strange device to be mutually stimulated to read novels because they think that reading novels is important, but constraining as well, their sharing books makes them avoid copyright payment. One could say that in this case there is no infringement of copyright since no copies are made. But the books are shared.²⁵

²⁴ See Shaffer Van Houweling 2005, on p. 1545 for examples.

²⁵ This was already explicitly defended by Proudhon : "Défendez-vous à l'amateur, qui vient de payer un livre, de réunir chez lui une douzaine d'amis, de faire des lectures, de prêter et faire circuler son volume?" (1862 : 39).

The sharing or copyrighted material in small circles is explicitly accepted in the legislation. The French legislation on fair use, which is referred to as the ‘private copy’ exception, mentions the right to give free representation in “the family circle”²⁶ At first sight, one could argue that P2P sharing is just an extended version of sharing in a family environment, especially when it does not need any copying. However, this way of considering P2P sharing is clearly in contradiction with the fourth justificatory ground of the fair use exception, i.e. the effect on the market. Unlike small scale sharing, P2P sharing among people who do not know each other is likely to have a considerable impact on the demand side of the market. It would therefore probably imply much unfair behaviour.

7. CONCLUSION

This paper is not an argument in favour of the abolition of copyright. It is obvious that we should clearly be aware of the reasons why copyright has been invented in the first place: without copyright as a device to cope with the ‘public good’ character of art creations many authors and musicians would have been unable to create their work, to their detriment and to the detriment of the consumers. However, faced with the new technological developments which tend to facilitate downloading, some ask whether copyright is not quickly becoming obsolete. Technological as well as philosophical arguments to reconsider the legal framework of artistic creation and the market of cultural goods have been advanced. In this paper, we have qualified an often heard argument, advanced by those who defend the prevailing copyright system, i.e. that illegal downloaders are morally objectionable ‘free-riders’. They may be, but certainly not all the time. We have indicated two different configurations in which this qualification of unfair behaviour does not hold: insofar as they download ‘winners’, they take a free ride on an unfair system, and insofar they lack purchasing power they are excluded from the regular market, which makes it questionable to call their free riding unfair. However, I am aware that, in both cases, it may be very difficult to draw a line between fair and unfair downloaders. The threshold which defines a musician as a ‘winner’ as well as the threshold of purchasing power which qualifies someone as poor enough to be excluded from the market are difficult to fix and applying these thresholds would presuppose much empirical data that we do not have.

²⁶ Code de la propriété intellectuelle, Art. L122-5 : « Lorsque l’œuvre a été divulguée, l’auteur ne peut interdire : 1° Les représentations privées et gratuites effectuées exclusivement dans un cercle de famille ».

Publishers may adopt a defensive strategy against free riding and try to develop ‘self-help’ systems, that is systems which make copying, also copying on your own computer, impossible. However, the development of such systems will be an infinite and costly race against people who break these systems. It might therefore be more interesting to think of alternative ways of coping with the public good aspect of creative material, like a package deal in which people pay a fix copyright tax together with their internet bill. One positive side effect of such an alternative may be a more equitable allocation among artists which, consequently, if my preceding arguments are correct, would make the scope of possibly ‘unfair’ free riding much smaller.

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